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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOHN ROEDER,

Plaintiff and Appellant,

v.

ALAN GARDNER,

Defendant and Respondent.

A123864

(Contra Costa County
Super. Ct. No. C08-00065)

Plaintiff John Roeder appeals from the order granting in part defendant Alan Gardner's motion to strike under the anti-SLAPP statute (Code Civ. Proc., § 425.16),¹ and awarding defendant attorney fees on the motion. Plaintiff challenges the granting of the motion as to the four causes of action stricken by the court, and the attorney fee award. We conclude that the motion was incorrectly granted as to the causes of action for extortion and defamation, and that the attorney fee award needs to be reexamined in light of that result. We thus affirm the order in part and reverse it in part.

I. BACKGROUND

Plaintiff is Chairman of the Board and an Executive Officer of Great Oaks Water Co. (GOWC), a water company regulated by the California Public Utilities Commission (CPUC). GOWC is a privately held corporation owned by plaintiff and his family. Defendant, an attorney who is licensed to practice law in states other than California, worked for GOWC from November 2001 to September 5, 2006, when his employment

¹ Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

was involuntarily terminated. During his tenure at GOWC, defendant performed legal research, negotiated lease agreements, worked on regulatory matters, and oversaw ongoing litigation for the company. After leaving GOWC, defendant described his position at the company as that of “Chief Operating Officer/General Counsel.”

Defendant sought severance compensation when he was terminated and, at the request of GOWC’s counsel, wrote a letter setting forth his claims against the company. This 12-page single-spaced e-mail dated October 10, 2006, made demands that, in plaintiff’s estimation, totaled approximately \$900,000. Defendant sought, among other things, “[t]he equivalent one year’s salary including benefits” to compensate him for having been “harassed and punished” by plaintiff “for whistle blowing for opposing misconduct, failure to follow rules or comply with state law,” and another year’s salary and benefits for harassment and discrimination he had suffered because of his Jewish religion.² Defendant accused GOWC and plaintiff of, among other things, CPUC and wage and hour violations. Defendant said that plaintiff had wrested control of GOWC’s operations from his mother, Betty Roeder, in 2005, in a manner that constituted “elder abuse.” Defendant did not state that he had aired any of these observations outside the company.

On December 3, 2006, defendant informed GOWC’s attorney that he was pursuing a claim against the company with the Labor Commissioner. The e-mail stated, “While I did not divulge the details of my claim letter concerning the primary non-wage claims, the Department advised they would pursue all of them on my behalf against the Company.” Defendant added, “I have not yet asked the PUC to pursue the claims under its jurisdiction.”

On January 15, 2007, defendant addressed a letter to plaintiff, Betty Roeder, and plaintiff’s sister, Jeanie Harris, as GOWC board members, and Bill Miller, a trustee of trusts controlled by Betty Roeder that held shares in GOWC, offering to settle his claims for \$250,000. Defendant “[n]ote[d] that the CPUC: Enforces rules against anti-Semitic

² Defendant’s annual salary at the time of his termination was \$262,000.

conduct; Enforces rules concerning protection of whistle blowers within its purview[;]
. . . Will clearly no longer regard GOWC's reputation as it has and will most likely put
enforcement orders in place to ensure strict future compliance[;] Will scrutinize GOWC
much closer and consider placing much more auditing oversight, particularly if GOWC
tries to expand within and outside of California."

The matter was not settled, and defendant obtained an award of compensation from the Labor Commissioner, which GOWC appealed. Defendant declares that on November 7, 2007, while the appeal was pending, he was informed that plaintiff "intended to bankrupt me and my family as a result of my filing a claim for lost income and benefits"—a threat plaintiff denies making. "At that point," defendant declares, "I decided that I just wanted to be left alone. I was willing to walk away from my prior award for compensation . . . and all of my other claims which were not part of that case in exchange for being left alone."

On November 28, 2007, GOWC offered to settle defendant's wage claims for \$8,000, but did not agree to give defendant a general release. Defendant's counsel rejected the offer in a November 29, 2007 e-mail to GOWC's counsel stating, "If your clients do not wish to enter into a mutual general release, one can only wonder what future litigation they have in mind. Mr. Gardner considers this a real threat and is prepared to fight fire with fire. Here is a list of the actions he is prepared to take in response to future litigation—not to mention his personal claims which you are already aware of. In the alternative these are the actions that he is prepared to give up in the walk away offer."

Attached to the counterproposal e-mail was a document listing allegations in complaints defendant would file with the CPUC, the Department of Industrial Relations (DIR), the Department of Public Health (DPH), and the Santa Clara County Public Guardian. The complaints alleged among other things that plaintiff had employed GOWC personnel and property on private family matters (CPUC complaint), that GOWC had failed to pay employee overtime (DIR complaint), that plaintiff had caused other people to take and complete his examinations for operator certificates (DPH), and that

plaintiff was guilty of elder abuse of Betty Roeder (Public Guardian). Under the headings “Request for Relief,” the CPUC complaint asked that plaintiff be “banned by the CPUC from being an officer, director[,], or having effective control through ownership or otherwise in a regulated company or affiliate in California for life,” and the complaint to the Public Guardian asked that plaintiff “be barred pursuant to statute from inheriting any interest from the estate or trusts owned or managed by Betty Roeder.” The document was prefaced with the statement: “Either we all walk away with unlimited general releases and mutually dissatisfied with the result, or your threat of litigation will not be one way. Both sides have something to lose.”

On December 1, 2007, defendant e-mailed the proposed CPUC complaint to plaintiff’s brother-in-law, Tex Harris, Jeanie Harris’s husband, with the message: “This is a summary of the full CPUC complaint. It is only one of four to State Agencies. I’m sure you can fully understand my push back against [plaintiff’s] threats to bankrupt me and my family. There is no give whatsoever about the unlimited general release. Given the consistency of his conduct and how the CPUC views me[,], I’m certain this will be taken very seriously. It is all based on solid evidence.” Tex Harris forwarded the e-mail to GOWC counsel.

GOWC promptly filed suit against defendant. The December 4, 2007 complaint sought among other things to enjoin defendant from disclosing any of the matters in the November 29, 2007 e-mail—what the complaint called “the extortion list”—on the ground, among others, that that defendant had obtained all of the information in question in his capacity as counsel to GOWC, and thus that the disclosure would violate his fiduciary duty to the company.

The lawsuit promptly settled. On December 6, 2007, the parties executed a “stipulation for entry of judgment for permanent injunction,” in which defendant acknowledged having had an attorney-client relationship with the company, and agreed that he would “not instigate, by any means, directly or indirectly, any complaints or requests for investigations, which are not his personal claims, to any agency of the State of California pertaining to any past or present practices or conduct of the plaintiff or its

agents, the existence of such practices or conduct [defendant] learned while employed by [GOWC].” Defendant further agreed that, without GOWC’s consent or a court order, he would not disclose “any confidential information” he learned while employed by GOWC “pertaining to [GOWC] or its agents.”

Plaintiff then filed this case in January 2008. The first amended complaint asserted causes of action for: breach of confidential relationship; civil extortion; “privacy-disclosure of private facts”; defamation; emotional distress; constructive fraud; negligence; and declaratory relief. Defendant moved to strike all of the causes of action under the anti-SLAPP statute. The motion was granted as to the causes of action for extortion, invasion of privacy, defamation, and emotional distress, and denied as to the other causes of action. The stricken causes of action were based on disclosures and threatened disclosures of alleged elder abuse of Betty Roeder and of alleged malfeasance in the conduct of GOWC’s affairs.³

The court awarded defendant \$9,325 for attorney fees and costs in connection with the motion.

II. DISCUSSION

A. Issues and Scope of Review

Resolving an anti-SLAPP motion is “[a] two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16,

³ The single exception is that the defamation cause of action was based in part on the allegation that, in June 2007, defendant told Tex Harris a false statement about an alleged communication between plaintiff and defendant’s new employer. The court sustained defendant’s evidentiary objection to the evidence for this allegation, which was presented in a declaration from Tim Guster, an in-house attorney for GOWC. Plaintiff has not challenged this evidentiary ruling, and has thereby waived any error in connection with this portion of his defamation claim.

subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. . . .” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Rulings on these issues are subject to de novo appellate review. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

Section 425.16, subdivision (c) provides that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.” Thus, “any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) The amount of the award is reviewed for abuse of discretion. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.)⁴

B. Protected Activity

Defendant’s argument that the stricken causes of action arose from protected activity is as follows: “In the instant action, [plaintiff] plainly seeks to restrain protected speech. [Defendant’s] letters addressed improprieties, including unfair employment practices, regulatory violations, and other wrongs that were taking place in a corporation which is responsible for supplying water to the City of San Jose. These are matters that, by definition, are in the public interest, central both to shareholders of the corporation, to the citizens who receive their water from [GOWC], and to the public in general.” Defendant is presumably referring here to section 425.16, subdivision (e)(4), which protects “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

⁴ In addition to raising conventional issues under the anti-SLAPP statute, plaintiff appears to argue that defendant’s motion should have been denied because the notice of motion identified the “[c]omplaint,” rather than the “first amended complaint,” as the pleading to be stricken. This argument fails because plaintiff identifies no prejudice created by this technical defect in the notice of motion.

Defendant's argument is conclusory and unsupported by authority, and the record contains little evidence about the nature of the company's business beyond the fact that it is a privately held water company regulated by the CPUC.⁵ However, plaintiff makes no attempt to dispute, and thus effectively concedes, that the stricken causes of action involved public issues or issues of public interest given the nature of the company's business.⁶ Plaintiff argues that the stricken causes of action did not arise from protected activity, but rather from defendant's "failure to meet his independent duties" to plaintiff created by their alleged attorney-client or confidential relationship. However, neither plaintiff's cause of action for breach of a confidential relationship, nor one for legal malpractice, is at issue. (Compare, e.g., *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1209, 1228 [corporation's causes of action against former attorneys for breach of fiduciary duty and legal malpractice did not arise from protected activity].) The acts in question here—disclosures and threatened disclosures of wrongdoing—are the sort of conduct the anti-SLAPP statute was designed to protect.

Plaintiff contends, based on *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), that the extortion cause of action did not arise from protected conduct because the evidence proved as a matter of law that defendant was guilty of extortion. *Flatley* held that a defendant may not invoke the protection of the anti-SLAPP law if "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Id.* at p. 320.) The defendant in *Flatley*, an attorney representing a woman whom plaintiff Flatley had allegedly raped, made

⁵ In his October 10, 2006, e-mail, defendant stated that GOWC "is a Class A regulated company, meaning it is in the most heavily regulated class of water companies. It is also the 9th largest in California." In his declaration in GOWC's suit against defendant, plaintiff indicated that GOWC has fewer than 20 employees.

⁶ While the alleged elder abuse of Betty Roeder was not a public issue, the disclosures and threatened disclosures regarding alleged improprieties involving GOWC were central to, and not merely incidental to, the stricken causes of action. (See *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 419 ["[w]here the allegations of constitutionally protected activity are not merely 'incidental' to the unprotected conduct, the protections of section 425.16 are implicated"].)

demands on Flatley that the court concluded amounted as a matter of law to extortion. (*Id.* at p. 332.) The court “emphasize[d]” that this conclusion was “based on the specific and extreme circumstances of this case,” and that the opinion “should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion.” (*Id.* at p. 332, fn. 16.)

Among the “specific and extreme circumstances” in *Flatley* were those “demonstrating that it was never [the defendant’s] intention to engage in settlement negotiations.” (*Flatley, supra*, 39 Cal.4th at p. 332.) The same could not necessarily be said here. Threats to report wrongdoing in the communications predating the November 29, 2007 e-mail could be seen as prompts to bring GOWC to the negotiating table rather than “immediate . . . threat[s] of exposure” as in *Flatley*. (*Ibid.*) Moreover, the November 29, 2007, e-mail on which plaintiff places particular emphasis was at least arguably *not* extortion. “Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear” (Pen. Code, § 518.) It is not clear that this definition could be stretched to cover threats made to obtain a general release. Plaintiff posits that “[p]roperty includes a right of action,” but a party seeking forbearance from the exercise of that right is not seeking to “obtain” the right in the conventional sense of that word. In any event, defendant’s statement that “your threat of litigation will not be one way” can be taken to signify an abandonment of any demand except to be left alone, and we fail to see how a threat to retaliate if one is sued could qualify as “extortion.”

Accordingly, we agree with the trial court that the evidence did not “conclusively establish[] that defendant’s conduct constitute[d] extortion as a matter of law,” and with the court’s conclusion that the stricken causes of action arose from protected conduct.

C. Probability of Prevailing

In order to establish a probability of prevailing, the plaintiff must make “ ‘a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence

submitted by the plaintiff is credited.’ ” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The plaintiff bears a burden akin to that of a party opposing a motion for summary judgment (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907-908), and need only show that the challenged causes of action have “minimal merit” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89). “[W]e accept as true all evidence favorable to the plaintiff and assess the defendant’s evidence only to determine if it defeats the plaintiff’s submission as a matter of law” (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700), “such as by establishing a defense or the absence of a necessary element” of the cause of action (*I-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585).

(1) Extortion

The elements of extortion are: (1) a wrongful use of force or fear, (2) with the specific intent to induce the victim to part with his or her property. (Pen. Code, § 518; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789.) Fear may be wrongly induced for purposes of extortion by a threat to “expose, or . . . impute to [the victim] . . . any . . . disgrace or crime.” (Pen. Code, § 519, subd. (3); see also Rules Prof. Conduct, rule 5-100(A) [an attorney “shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute”].)

Defendant has a potentially meritorious privilege defense to plaintiff’s extortion claim. Defendant can argue that, while he was pursuing his claims against GOWC, he made references to plaintiff’s alleged misconduct in order to induce GOWC to bargain with him on his case, rather than to induce plaintiff to pay for his silence. If a trier of fact were to accept that account of defendant’s specific intent, then the communications were not extortionate, and were protected by the litigation privilege as statements made during settlement negotiations. (Civ. Code, § 47, subd. (b); *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 843-844; *Asia Investment Co. v. Borowski* (1982) 133

Cal.App.3d 832, 842-843.)⁷ We note in this regard that all of the communications at issue, other than the first demand letter, were made during the pendency of litigation over defendant's severance compensation, and that the initial demand letter was furnished at the request of GOWC's counsel. Further, as has been noted, the threatened disclosures were not extortionate to the extent they merely described actions defendant intended to take if he were sued.

On the other hand, the personal nature of defendant's threats could support a finding that defendant was extorting plaintiff, and not merely negotiating with GOWC. This conclusion is supported by the "relief requested" in the November 29, 2007 e-mail, which included a lifetime ban on plaintiff's serving as an officer of "a regulated company or affiliate," relief that extended beyond GOWC's affairs, and plaintiff's disinheritance, relief that had nothing to do with GOWC. While the November 29, 2007 e-mail itself may not have been actionable, it could be taken to shed light on the intent behind the earlier threats. Given all of the evidence, a trier of fact could find that the settlement demands against GOWC were aimed, at least in part, to extort plaintiff. The issue is one of specific intent which cannot be conclusively resolved against plaintiff at this stage of the case.

Defendant argues for dismissal of the extortion cause of action based on the alleged res judicata effect of the judgment in GOWC's action against him, but plaintiff was not a party to that action and that action did not resolve plaintiff's extortion claim. Defendant ventures, alternatively, that while "[plaintiff] has shown that [defendant] sought back pay and other money damages from [GOWC] . . . he has not shown—and cannot show—that [defendant] sought any money from [plaintiff] personally." As the foregoing discussion has demonstrated, we disagree with that contention.

⁷ In his opening brief, plaintiff argues that defendant waived any claim of privilege by failing to plead it as an affirmative defense. Defendant asserts in his brief, without citation to the record, that the trial court permitted him to amend his answer to include that affirmative defense, an assertion plaintiff does not dispute in his reply brief. Because the privilege defense is not dispositive of any of the causes of action, we need not address the waiver argument.

For these reasons, the court erred in dismissing the extortion cause of action.

(2) Privacy

The elements of a cause of action for public disclosure of private facts are:

“(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.” (*Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 126.) “ ‘[P]ublic disclosure’ ” in this context means “ ‘publicity’ ” (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 828), and “ ‘[p]ublicity’ ” “means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge” (Rest.2d of Torts, § 652D, com. a, pp. 384-385). The requisite publicity was absent here because defendant’s allegations were disclosed only to plaintiff’s family members, a trustee acting on behalf of Betty Roeder, and GOWC attorneys. The allegations were not disclosed to the public at large, or substantially certain to become public knowledge.

Therefore, the privacy cause of action was correctly dismissed.

(3) Defamation

“Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.)

Defendant argues that the cause of action for defamation was properly dismissed because plaintiff failed to show that defendant’s allegations against him were false, that the allegations were unprivileged, or that he suffered any special damage. However, plaintiff declared that some of defendant’s allegations were false, including those that he was “converting property of others,” “improperly using a company vehicle,” and “violating certain [CPUC] rules.” Thus, the truth of the allegations was effectively controverted for purposes of the anti-SLAPP motion. As for privilege, even if defendant’s communications with GOWC’s attorneys and board members were found to be privileged settlement negotiations, that privilege would not extend to statements in the

e-mail to Tex Harris, who had no connection with GOWC apart from being married to a board member. As for damages, plaintiff did not need to prove special damages because defendant's charges against him, such as misappropriation of company property, fraud in connection with licensing examinations, and elder abuse, were libel per se. (Civ. Code, § 45a; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 541, pp. 794-795.)

Accordingly, the defamation cause of action should not have been dismissed.

(4) Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are: “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.” (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593.)

The first amended complaint alleged that defendant was “aware of [plaintiff's] peculiar susceptibility to emotional distress,” but plaintiff offered no proof of any such special sensitivity, and made no effort to establish that defendant's actions caused him to suffer emotional distress that was severe or extreme. Plaintiff simply stated that defendant's communications “caused me to suffer distress including anxiety.”

This showing was insufficient, under the recent decision in *Hughes v. Pair* (2009) 46 Cal.4th 1035, to establish the requisite emotional distress. The opinion in that case states: “With respect to the requirement that a plaintiff show severe emotional distress, this court has set a high bar. ‘Severe emotional distress means “ ‘emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’ ” ’ [Citation.]” (*Id.* at p. 1051.) The plaintiff in that case claimed that she had been sexually harassed by the defendant, and that she had “suffered discomfort, worry, anxiety, upset stomach, concern, and agitation as the result of [the defendant's actions].” (*Ibid.*) The court held that this evidence did not prove that the plaintiff had suffered severe emotional distress. (*Ibid.*) The same conclusion obtains here on plaintiff's even more minimal showing.

Thus, the cause of action for intentional infliction of emotional distress was correctly dismissed.

D. Attorney Fees

Defendant sought an attorney fee award of \$9,325. Defendant's counsel indicated in her declaration supporting the fee request that she was staff counsel employed by defendant's liability insurer. The court acknowledged that defendant had only partially prevailed on the motion, but awarded the full fee amount sought based on a finding that "apportionment is not required as all the claims were intertwined."

Plaintiff argues that the fee award was improper because defendant was not liable for the fees, and the cost of his counsel was being covered by an insurance carrier. Essentially the same argument was considered at length and persuasively rejected in *Rosenauro v. Scherer* (2001) 88 Cal.App.4th 260, 282-287 (*Rosenauro*), where counsel had agreed to represent the defendant on a "partial pro bono basis." (See also *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 675-676.) The anti-SLAPP statute does not distinguish "between defendants who advance their own attorney fees and those whose counsel look to an outside source for payment. In each case, the fees have accrued and can be recovered." (*Rosenauro, supra*, 88 Cal.App.4th at p. 285.)

As for the amount of the award, defendant is not "entitled to obtain as a matter of right his or her entire attorney fees incurred on successful and unsuccessful claims merely because the attorney work on those claims was overlapping." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 344-345, italics omitted.) "Instead, the court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation and whether the expenditure of counsel's time was reasonable in relation to the success achieved." (*Id.* at p. 344.)

Since the amount of the award depends in part on the result achieved, and we have determined that the anti-SLAPP motion had merit as to only two, rather than four, of the eight causes of action at which it was aimed, the amount of the award needs to be reconsidered in light of our decision.

III. CONCLUSION

The order on the anti-SLAPP motion is reversed insofar as it strikes the causes of action for extortion and defamation, and awards attorney fees. The balance of the order is affirmed. The trial court is directed to reconsider the amount of the fee award in light of our decision. Defendant is entitled to his reasonable attorney fees and costs incurred on appeal in connection with the causes of action for disclosure of private facts and intentional infliction of emotional distress, in an amount to be determined by the trial court. The parties will otherwise bear their own costs in this appeal.

Marchiano, P.J.

We concur:

Margulies, J.

Dondero, J.